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No. 98-211

In The

Supreme Court of the United States

October Term, 1997

BILLY JOE TURLINGTON and ELLEN JOCILE TURLINGTON,

Petitioners,

vs.

ATLANTA GAS LIGHT COMPANY, RANDY CURRY and ROBERT MILLER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM D. DEVENEY
Counsel of Record
JEFFREY B. KENT
ELARBEE, THOMPSON & TRAPNELL
Attorneys for Respondents
800 International Tower
229 Peachtree Street
Atlanta, Georgia 30303
(404) 659-6700

148802

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the courts below correctly ruled that Petitioner could not use time-barred evidence of allegedly discriminatory training practices to establish a prima facie case of age discrimination.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

The parent company of Respondent Atlanta Gas Light Company is AGL Resources, Inc. Atlanta Gas Light Company has no nonwholly owned subsidiaries.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondents Atlanta Gas Light Company, Randy Curry and Robert Miller respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners Billy Joe Turlington and Ellen Jocile Turlington.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 135 F.3d 1428 (11th Cir. 1998) and is reproduced at App. 1 of the Petition for Writ of Certiorari. ("App.") The opinion of the United States District Court for the Northern District of Georgia is unpublished and is reproduced at page App. 23.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals on Petition for Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The dispute in this case does not involve any constitutional provisions. The statutory provision at issue is 29 U.S.C. § 626(d)(1), a portion of the Age Discrimination in Employment Act ("ADEA"). This provision is reproduced at page App. 33.

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioners Billy Joe Turlington ("Turlington") and Ellen Jocile Turlington ("Ellen Turlington") filed suit in Federal District Court in Georgia alleging that Respondents Atlanta Gas Light Company ("AGL"), Randy Curry ("Curry"), and Robert Miller ("Miller") discriminated against Turlington on the basis of his age in violation of the ADEA, breached certain alleged contractual obligations to him and intentionally and/or negligently inflicted emotional distress against him in violation of Georgia law. Ellen Turlington also filed a claim for loss of consortium. After full discovery, Respondents AGL, Curry and Miller filed a motion for summary judgment as to all claims. The district court granted that motion, dismissing all claims and awarding attorney's fees and costs to Respondents.

Turlington appealed only the dismissal of one ADEA claim against AGL and the award of attorney's fees and costs. Affirming the District Court's grant of summary judgment in favor of AGL on Turlington's ADEA claims, the United States Court of Appeals for the Eleventh Circuit followed this Court's binding decisions of *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), holding that Turlington could not use time-barred evidence of allegedly discriminatory training practices to establish a prima facie case of age discrimination. This petition followed.

B. The Factual Record

Respondents AGL, Curry and Miller refer this Court to the opinion of the United States Court of Appeals for the Eleventh Circuit for an accurate statement of the facts of this case. App. 1-22.

C. Response to the Turlingtons' Statement of the Case

The Turlingtons' Statement of the Case omitted several undisputed material facts, the most significant of which is the fact that, on or before July 9, 1993, Turlington hired an attorney to represent him against AGL for alleged age discrimination. App.3; Turlington Dep. 396-98. Even though this fact establishes that Turlington had notice of the alleged discriminatory act which underlies his present claim by that date, Turlington failed to file a timely charge of discrimination with the EEOC.

Thereafter, on July 20, 1993, Turlington's attorney wrote a letter to AGL's Chief Executive Officer, David Jones, advising that he had been retained to represent Turlington against AGL,

> [f]or the discriminatory action taken against my client of the last several years culminating with his transfer of his position of long standing to a totally unrelated manual labor position in the carpenter shop.

App. 3; Turlington Dep. 428-29, Plf. Ex.6.

That letter explicitly showed that Turlington had notice of AGL's actions which he claimed violated the ADEA:

> Please be further advised that my client is over the age of forty (40) and he is protected by federal law governing discrimination as to age in employment and has indeed been discriminated against because of his age.

Id. Again, Turlington failed to file a charge of discrimination with the EEOC within 180 days of either the date of his transfer

or his counsel's July 20, 1993 letter, even though he later claimed that this transfer was "predicated by the denial to [Turlington] of sufficient on the job training, practice time, and various skill level acquisition training." R1-1-6, ¶ 16.

Turlington also failed to inform this Court of the critical fact that the person who made the decision to reject Turlington's application for the I/S Department position in October 1994, Dale Kilpatrick, succeeded Respondent Miller as the I/S Department Manager in November 1993, several months **after** Turlington was transferred out of that department. App. 3; R1-16-Kilpatrick Dec., ¶ 1. As such, Kilpatrick did not prepare any of the performance evaluations which documented Turlington's poor performance in the I/S Department between 1990-1993, and Kilpatrick was not one of the supervisors who participated in Turlington's transfer from that department on July 9, 1993. *Id.*; Turlington Dep. 42-47, Plf. Ex. 1.

Finally, in his Petition, Turlington admitted that he was demoted from his position as Supervisor of Shift Operations in AGL's I/S Department in 1990, but he neglected to mention that his failure to demonstrate job improvement during the prior year prompted the demotion. App. 2. Turlington also failed to inform this Court that, even after this demotion to the position of Class "A" Computer Operator, Turlington earned four consecutive unacceptable annual performance evaluations which led to his transfer out of the I/S Department on or about July 9, 1993. App. 3; Turlington Dep. 397-98.

These undisputed facts, coupled with this Court's binding decisions in *Evans* and *Ricks*, properly led the United States Court of Appeals for the Eleventh Circuit to affirm summary judgment on Turlington's claim.

REASONS FOR DENYING THE WRIT

No compelling reason warrants the granting of a writ of certiorari in this case. The decision below does not conflict with controlling Supreme Court cases, correctly applies the settled law of this Court and is not in conflict with decisions of other courts of appeals.

I.

THE ELEVENTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE CONTROLLING STANDARD FOR LIABILITY UNDER THE ADEA.

In *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), this Court clarified the standard for liability under the ADEA. In *Hazen Paper*, a unanimous Court held that, "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) **actually motivated** the employer's decision." *Id.* at 609 (emphasis supplied). Since Turlington offered no evidence of a discriminatory motive for the challenged employment decision, the Eleventh Circuit properly affirmed summary judgment to AGL.

In his appeal and in this petition, Turlington alleged only one discriminatory act: Kilpatrick's rejection of Turlington's 1994 application for a Class "C" Computer Operator position in the I/S Department. App. 5. Turlington, however, does not claim that age discrimination motivated Kilpatrick to make that decision. App. 4. Indeed, Turlington concedes that his prior poor performance in the I/S Department, as documented by his unacceptable 1990-1993 performance evaluations, motivated Kilpatrick to reject Turlington's application. R1-1-11; Turlington Dep. 201, Dft. Ex. 13. Turlington nevertheless complains that his poor performance was caused by

discriminatory denial of training from 1990-1993, a claim wholly unrelated to Kilpatrick, the ultimate decision-maker. App. 4; Turlington Dep. 122. As such, Turlington has offered no evidence that the employment decision was motivated by age discrimination, and summary judgment was proper under *Hazen Paper*.

II.

THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN *UNITED AIRLINES, INC. v. EVANS*, 431 U.S. 553 (1977), AND *DELAWARE STATE COLLEGE v. RICKS*, 449 U.S. 250 (1980).

This Court has held that past discriminatory acts alone cannot establish a present violation of anti-discrimination laws. *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Nevertheless, Turlington relies solely upon his claim that his rejected application for a position in the I/S Department gives present effect to a past act of alleged discrimination. App. 13-14. He claims that his poor performance, which alone caused Kilpatrick's rejection of Turlington's application for a position in the I/S Department, was the result of alleged discriminatory denial of training in 1990-1993. Petition for Writ of Certiorari 3. This Court expressly rejected such claims in *Evans*, holding that an employer is entitled to treat a past act as lawful after an employee fails to file a charge of discrimination within 180 days of that past act. *Evans*, 431 U.S. at 558.

In *Evans*, the defendant's established policy of refusing to employ married female flight attendants required the plaintiff to resign her position when she married. That policy was subsequently found discriminatory under Title VII in an action to which Evans was not a party. Thereafter, Evans was hired as a new employee with no credit for her prior service or seniority.

Alleging that United was guilty of a continuing violation of Title VII, Evans filed a complaint seeking the seniority that had been lost due to the prior discriminatory policy. *Evans*, 431 U.S. at 554-556.

Acknowledging that Evans was "correct in pointing out that the seniority system [gave] present effect to a past act of discrimination," this Court nevertheless held that her complaint was properly dismissed as time-barred:

> **United was entitled to treat that past act as lawful after Respondent failed to file a charge of discrimination within the 90 days then allowed by Section 706(d).** A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequence.

Evans, 431 U.S. at 558 (emphasis supplied). The Eleventh Circuit properly followed the above language and ultimate holding in *Evans*, rejecting Turlington's claim.

Conceding that this Court's holding in *Evans* bars his claim, Turlington attempts to claim that the dicta contained in a footnote in *Evans* suggests that his claim is not time-barred. Turlington is wrong.

In note 9 of the *Evans* decision, this Court observed that Evans had failed to file a charge of discrimination within 90 days of her rehire as well. *Evans*, 431 U.S. at 557. By relegating

that fact to a footnote, this Court showed that it relied upon the fact that Evans failed to file a claim within 90 days of the underlying discriminatory act — the policy of refusing to employ female flight attendants — not on the fact that Evans suffered some subsequent harm as a result of this earlier act. The fact that Evans failed to file within 90 days of her rehire, like Turlington's failure to file a charge of discrimination within 180 days of his poor performance evaluations or his transfer from the I/S Department in July 1993, is merely additional evidence of the delay that the plaintiff in *Evans* and Turlington herein seeks to excuse. This Court instead held that it is the discriminatory **act** — in *Evans* the no-marriage rule, in this case the alleged denial of training — that starts the limitations period running, not the time at which the plaintiff suffers a job loss as a result of such acts. This Court's intent was crystallized by its later holding in *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), where this Court stated that "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." (Cits. omitted.)

Moreover, even Turlington's misguided interpretation of note 9 of *Evans* does not support his claim. Unlike the situation described in that note, which Turlington claims sets forth a second discriminatory act from which the statutory period in which to file an EEOC charge begins to run anew, Kilpatrick's denial of Turlington's September 1994 application to the I/S Department was not a second discriminatory act which reset the statute of limitations. Turlington expressly asserted that Kilpatrick's rejection of his application based on his previous poor performance evaluations was

> part and parcel, and **completely a result of, past discrimination** against [Turlington] occasioned upon him between 1990 and 1993 when IS

> Department managers, supervisors and younger co-workers discriminated against [his] ability to receive adequate training.

R2-21-11 (emphasis supplied). *See also* R1-1-11; Turlington Dep. 201, Dft. Ex. 13. Turlington claimed that he was discriminatorily denied training between 1990-1993. He claimed that this denial of training led to his admittedly poor performance in the I/S Department. Turlington then claims that this poor performance led to admittedly substandard performance evaluations. Finally, he claims that these poor performance evaluations led to Kilpatrick's rejection of Turlington's application for the I/S Department job. *Id.* Such a tenuous string of allegations cannot support an argument to extend the limitation period and goes far beyond the situation described in note 9 of *Evans*.

The Eleventh Circuit also properly applied this Court's holding in *Ricks*, *supra*, which significantly elaborated on its earlier holding in *Evans*. Specifically citing to the language at issue in *Evans*, the *Ricks* Court explained that the statutory limitations period "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57 (*citing Evans*, 431 U.S. at 558). *See also id.* at 259-60 (limitations provision promotes important interest of "prohibiting the prosecution of stale [claims]".

In *Ricks*, the plaintiff, a college professor, grieved the formal denial of his tenure in March 1974. While this grievance was pending, the professor was offered a one-year terminal contract, which was to expire in June 1975. The professor was notified that his grievance had been denied in September 1974, but waited until after the expiration of his terminal contract to file a charge with the EEOC contesting the original denial of tenure.

Affirming the dismissal of the professor's claim as time-barred, the Court explained that the

> [m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. [*Citing Evans.*] If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment.

Id. at 257. The Court observed that

> the only alleged discrimination occurred — and the filing limitations period therefore commenced — at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure — the eventual loss of a teaching position — did not occur until later.

Id. at 258.

Turlington has similarly failed to identify any alleged discriminatory act "that continued until, or occurred at the time of," his rejection for the computer operator position in October 1994. Turlington did not offer any evidence suggesting that Kilpatrick was motivated by any reason other than Turlington's previous poor performance in the I/S Department. Turlington himself argued, in opposing summary judgment, that Kilpatrick's rejection of his application was "completely a result of" the alleged past discrimination "occasioned upon him between 1990 and 1993." R2-21-11. Therefore, Turlington presented no evidence of any discriminatory act "that

continued" after Kilpatrick succeeded Miller as manager of the I/S Department in November 1993. *Ricks*, 449 U.S. at 257 n. 8.

Turlington's attempt to distinguish *Ricks* because *Ricks* involved only a single discriminatory act is unpersuasive. After claiming throughout this litigation that his rejection for the computer operator position in October 1994 was the same act as the alleged denial of training (*see* R2-21-11), Turlington cannot now claim that the rejection was a separate discriminatory act, especially because Turlington has offered no evidence that the employment decision was motivated by age discrimination in any way. (*See* section 1, *supra.*)

Turlington's claim that *Ricks* should be distinguished because his rejection did not "*inevitably* flow" from the alleged denial of training was rejected by this Court in *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 907 n.3 (1989). In *Lorance*, this Court followed *Ricks* in holding that it is not the date when an injury becomes most concrete but when the discriminatory **act** occurs. *Id.* In this case, as in *Ricks*, the limitations period commenced on the date of the alleged discriminatory **act**, not on the date when the consequences of that act became most painful. *Ricks*, 449 U.S. at 258.

This Court's pronouncements in *Evans* and *Ricks* make sense. Supervisors at companies do not remain the same indefinitely. A new supervisor must be allowed to rely on previous decisions and assessments made by predecessors without fear of lawsuits filed years after those earlier decisions, especially where such decisions could have been made the subject of a proper legal challenge but were not. As this Court stated in *Ricks*:

> The limitations periods, while guaranteeing the protection of civil rights laws to those who promptly

> assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past.

Ricks, 449 U.S. at 257 (citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)).

Thus, it is clear that the Eleventh Circuit properly applied this Court's decisions in *Evans* and *Ricks* in properly affirming summary judgment to AGL.

III.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The cases from the First, Fourth, Ninth and D.C. circuits cited by Turlington do not conflict with the Eleventh Circuit opinion in the case below. The facts presented in this case are far different from those presented in the cases relied on by Turlington. Of paramount significance is the fact that, not only did Turlington have knowledge of the prior allegedly discriminatory denial of training when it occurred in 1990-1993 and have an opportunity to correct it, he hired an attorney to represent him for the alleged discrimination at that time. Moreover, contrary to his assertions in the Petition, Turlington did not contend that the 1994 rejection was a separate act motivated by a discriminatory animus. Instead, Turlington expressly asserted that the rejection of his application was "part and parcel, and completely a result of, past discrimination against [Turlington] occasioned upon him between 1990 and 1993." R2-21-11.

The factual scenario presented herein is far different from those in the cases upon which Turlington relies. For example, in the D.C. Circuit Court case, *Stoller v. Marsh*, 682 F.2d 971

(1982), the court specifically relied on the fact that the plaintiff had no knowledge of the underlying discriminatory act and had no opportunity to correct it. The court held:

> If the employer provides procedures for employees to inspect and correct their supervisory evaluations . . . the employees' rights are sufficiently protected and the employer may subsequently rely in good faith on the evaluations without . . . liability.

Stoller, 682 F.2d at 977 (n.9).

The *Stoller* court explained what procedures would satisfy this requirement:

> [G]eneral procedures for disclosure of employee appraisals, coupled with grievance procedures for correcting inaccurate files, might be sufficient. As long as an employee has the chance to examine and correct his supervisory evaluations, he may be expected to challenge those he believes to be discriminatory.

Id. at 979 (n.11).

In the present case, Turlington does not even contend that his substandard performance evaluations were incorrect. He claims only that the alleged denial of training caused his poor performance. During his deposition, Turlington was asked: "So are you saying, then that because you were denied training, your performance was not as good as it could have been, and, therefore, you got a bad performance evaluation?" Turlington answered, "Right." Turlington Dep. 122. Later in his deposition, when Turlington was asked: "You were denied training that some of the younger individuals received, and therefore, they

were more qualified than you were because of the training that they received that you were denied?" Turlington responded, "That's correct. And I was evaluated against it." Turlington Dep. 261. Moreover, Turlington had an opportunity to see and respond to these performance evaluations. Turlington Dep. 262, Plf. Ex. 5. As suggested in *Stoller*, Turlington could have filed a complaint regarding this training or his poor performance evaluations. Despite hiring an attorney, Turlington failed to do so before the limitation period expired. The fact that Turlington had knowledge of the prior allegedly discriminatory act and had the opportunity to correct or file a claim regarding such act distinguishes this case from *Stoller*.

Likewise, the Court of Appeals for the First Circuit based its decision in *Johnson v. General Electric*, 840 F.2d 132 (1988) on the fact that the plaintiff had no knowledge of an allegedly discriminatory trial review until he was denied a promotion based on the results of that review. The court held that, until that denial, "Plaintiff did not know that the alleged unfair process would have any adverse effects whatsoever." *Id.* at 137. The court explained:

> Neither *Ricks* nor any other Supreme Court case has held that the statute of limitations may start running before the plaintiff is **aware that he will in fact be injured** by the challenged practice.

Id. (emphasis supplied). Finding that the plaintiff in *Johnson* was aware of no injury until he was told that he had failed the trial review, the court held that his claim was not time-barred for failing to file an action within 180 days after the trial review process was established. In this case, on the other hand, Turlington not only possessed knowledge of the alleged discriminatory act as it occurred, he also suffered the consequences of that act on two occasions. First, as a result of

his admittedly poor performance in the I/S Department, allegedly caused by the denial of training, Turlington received four consecutive substandard performance evaluations. App.3. Thereafter on or about July 9, 1993, Turlington was transferred out of the I/S Department as a result of his poor performance. *Id.* Far different from the plaintiff in *Johnson*, Turlington not only knew about these consequences of the alleged discriminatory act, he **hired a lawyer to represent him for such acts**. *Id.* The fact that Turlington and his lawyer failed to file a charge of discrimination with the EEOC at that time cannot extend the limitation period indefinitely. Therefore, even under the First Circuit's analysis in *Johnson*, Turlington's claim is untimely.

A similar rationale persuaded the Court of Appeals for the Ninth Circuit in *Bouman v. Block*, 940 F.2d 1211 (1991).[1] *Bouman* involved a female deputy sheriff who claimed that the department's sergeant examination discriminated against women. The Ninth Circuit held that the statute of limitations began to run on the day the promotion list drawn from the results of that examination expired rather than on the date the examination was adopted. In so holding, the Ninth Circuit held that the maintenance of the promotion list was a **separate** injury, and the plaintiff suffered no injury until that list expired and she was not promoted. In this case, on the other hand, Turlington has shown no separate injury. The denial of his application to

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1. The other Ninth Circuit case upon which Turlington relies is *Sangster v. United Airlines, Inc.*, 633 F.2d 864 (1980). The court in *Sangster* held that the plaintiff's right to sue accrued not on the date of the date of the discriminatory act but on the date when the plaintiff "felt the impact of the discriminatory [act]." *Id.* at 867. *Ricks*, which post-dates *Sangster*, expressly rejected this rule, holding that "the proper focus is upon the time of the discriminatory acts not upon the time at which the consequences of the acts became most painful." *Ricks*, 449 U.S. at 258 (cits. and internal quotations omitted).

the I/S Department was "part and parcel, and completely a result of, past discrimination." R2-21-11.

Moreover, the legally unchallenged performance evaluations and transfer out of the I/S Department in July 1993 clearly put Turlington on notice that the allegedly discriminatory denial of training would affect him, while the plaintiff in *Bouman* was eligible for promotion until the promotion list expired. Thus, *Bouman* does not support Turlington's claim.

For similar reasons, *Lendo v. Garrett County Board of Education*, 820 F.2d 1365 (4th Cir. 1987) is inapplicable. In *Lendo*, the plaintiff received two negative evaluations and was later denied tenure based, in part, on those evaluations. The Fourth Circuit held that, because the plaintiff had no knowledge that the negative evaluations would affect his job, the statute of limitations did not begin to run until he was denied tenure. Again, the situation in *Lendo* is different from the facts presented herein. Turlington knew that the allegedly discriminatory act would affect him, initially when he received four consecutive unacceptable performance evaluations, and again when he was transferred out of the department because of his poor performance. The rejection of his application in the I/S Department was merely a "continuing *effect*[ ] of a previous [allegedly] discriminatory act" and does "not extend the running of the statute of limitations." *Lendo*, 820 F.2d at 1368.

It is clear that the opinion of the Eleventh Circuit is not in conflict with the decisions of other courts of appeals. Therefore, there exists no compelling reason for granting Turlington's Petition for Writ of Certiorari.

CONCLUSION

Since the Eleventh Circuit opinion below is in accordance with this Court's precedents and does not conflict with the decisions reached in other Courts of Appeals, and for the reasons given above, Turlington's Petition should be denied.

Respectfully submitted,

WILLIAM D. DEVENEY
Counsel of Record
JEFFREY B. KENT
ELARBEE, THOMPSON
& TRAPNELL
Attorneys for Respondents
800 International Tower
229 Peachtree Street
Atlanta, Georgia 30303
(404) 659-6700